UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

HOWARD E. THOMAS, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security,, Defendant.	No. C02-4090-PAZ **MEMORANDUM OPINION AND ORDER**

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I. INTRODUCTION

The plaintiff Howard E. Thomas ("Thomas") appeals a decision by an administrative law judge ("ALJ") denying him Title II disability insurance ("DI") benefits. Thomas argues the ALJ improperly evaluated the evidence in several respects, resulting in an erroneous conclusion that Thomas could return to his past relevant work. Thomas claims that because of these errors, the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. No. 7)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On June 9, 2000, Thomas filed an application for DI benefits, alleging a disability onset date of June 30, 1995. (R. 511-13) Thomas subsequently received a decision denying a prior application for DI benefits. (R. 473-75; *see* R. 99-446) Thomas did not appeal the denial of benefits, and therefore, at the ALJ hearing, he amended his alleged onset date to September 2, 2000.[1] (R. 46)

Thomas's June 9, 2000, application was denied initially on October 3, 2000 (R. 476-79), and on reconsideration on January 23, 2001 (R. 481-84). On January 30, 2001, Thomas requested a hearing (R. 485), and a hearing was held before ALJ Emily Cameron Shattil on March 22, 2002. (R. 43-98) Thomas was represented at the hearing by attorney Wil Forker. Thomas and Vocational Expert ("VE") Gail Leonhardt testified in person at the hearing, and Medical Expert Steven J. Wees, M.D. testified by telephone.

On April 26, 2002, the ALJ ruled Thomas was not entitled to benefits. (R. 12-30) On May 17, 2002, Thomas requested review of the ALJ's decision. (R. 10) The Appeals

[1]Thomas's insured status ended December 31, 2000, so he must show he was disabled prior to that date. (*See* R. 15)

Council of the Social Security Administration considered additional evidence submitted by Thomas subsequent to the ALJ hearing (R. 8, 689-702), and on August 16, 2002, the Appeals Council denied Thomas's request for review (R. 6-7), making the ALJ's decision the final decision of the Commissioner.

Thomas filed a timely Complaint in this court on October 1, 2002, seeking judicial review of the ALJ's ruling. (Doc. No. 3) On October 21, 2002, pursuant to the parties' consent, Chief Judge Mark W. Bennett transferred this matter to the undersigned United States Magistrate Judge for consideration and entry of final judgment. Thomas filed a brief supporting his claim on April 3, 2003. (Doc. No. 14) The Commissioner filed a responsive brief on May 21, 2003. (Doc. No. 15) The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Thomas's claim for benefits.

B. Factual Background

1. Thomas's testimony and work history

At the time of the hearing, Thomas was 50 years old, 6'1" tall, and weighed 330 pounds. He was living in a one-room apartment in Sioux City, Iowa. He had completed the twelfth grade in high school. Although he stated reading was not his best subject, he indicated he could follow a recipe, use a phone book to find an address, and count change.

The record indicates most of Thomas's relevant work history consisted of working as a meat cutter and neck boner at John Morrell and other meat packing plants. He described his duties and the job requirements in a Work History Report dated June 27, 2000. (R. 541-48) He worked as a neck boner from March 1988 to December 1993. The job involved cutting hog neck bones, unloading trucks of pork, hanging meat, stacking boxes of meat, and doing clean-up duties. He was required to lift fifty pounds frequently, and occasionally up to 100 pounds or more. From January to December 1994, Thomas

worked as a meat cutter at John Morrell. He sometimes was required to empty tubs of material weighing 300 or more pounds, stack boxes of meat weighing thirty-five to 175 pounds, and pick up hogs weighing 200 to 300 pounds. He lifted fifty pounds or more frequently. He moved around to different jobs as needed, for example working on both the "kill floor" and the cutting floor, and his duties required him to walk, stand, climb, kneel, crouch, and crawl. He had to handle, grab, or grasp big objects, but did not have to write, type, or handle small objects.

In December 1994, Thomas was injured when a garage door came down on him at work, striking him on the shoulders. X-rays were negative, but Thomas continued to suffer pain, headaches, and other problems after the accident. He was placed on light duty, cleaning the cafeteria and bathrooms. He eventually was fired by John Morrell in June 1995, because he could not perform his job duties.

At the time of the ALJ hearing, Thomas opined he would have difficulty lifting twenty pounds, stating he had numbness in his arms and hands. He stated he could lift a gallon of milk weighing eight pounds, but he usually avoided lifting anything heavier than that for fear he would drop it. He noted all of his prior jobs had been very physical, "labor jobs," which was all he knew how to do. He stated his problems with numbness in his arms and hands, problems standing, and pain in his low back, neck and shoulders would prevent him from performing any of his past jobs. He disagreed with a consulting doctor's opinion that he could stand for six hours during an eight-hour day with periodic breaks, noting he is unable to stand even long enough to wash his dishes without sitting down and taking a break. He stated standing causes his low back to hurt, and he had suffered low back pain ever since his accident at work.

Thomas stated his one-room apartment does not require much cleaning, and what is required, he does himself. He does grocery shopping, usually buying about four sacks

of food at one time. He indicated he has "a big feed bag, and a two-wheeler" that he uses to carry the groceries. He walks with a cane because he tends to lose his balance frequently, and he stated his doctor has told him the balance problem is due to the arthritis in his knees. He wears braces on both legs which helps his balance problem somewhat, but not completely. He stated if he does not wear the leg braces, he has more pain in his back. He stated he can walk up to a block at one time, and he can climb the three stairs going up to his apartment. As far as how long he can sit at one time, he indicated it depends on the type of chair. On the trip from Sioux City to Omaha for the ALJ hearing, which took about an hour and twenty minutes, he shifted positions whenever his leg or groin area went numb, and the trip left his back feeling sore. If he sits on a hard surface, "anything below [his] belt goes numb." He indicated he cannot sit in one place for an hour at a time on any type of surface.

Thomas stated he does not sleep through the night due to pain and numbness in his arms. He goes to bed around 10:00 p.m., and is usually back up again between 1:00 and 3:00 a.m. He will return to bed about 5:30 or 6:00 a.m.

On a typical day, Thomas will get up and watch some television, take a shower, get dressed, take his medications, and then "get up and move around." He will drive over to his mother's house, about seven blocks away, and stay for about an hour. While he is there, he sits on the couch, gets up and stands, walks around, sits again -- he does not stay in one place because of his back and leg problems. When he leaves his mother's, he might go to Goodwill and shop for around twenty minutes, and then "go somewhere else and get out, walk around for about 20 minutes, and go back and sit down." He seldom listens to the radio, and he generally does not watch television during the day. He spends most of his day "[j]ust floating around," and gets back home by 3:00 or 4:00 p.m.

Thomas stated he began living alone in about May 2001, when he and his wife separated. When they were together, his wife did all of the household chores.

2. Thomas's medical history

The record in this case is voluminous, containing medical records dating back to 1986. As noted previously, Thomas filed a previous application for benefits that was denied, and the bulk of the record evidence deals with the period under consideration in that previous application. In its review of Thomas's medical history, the court will discuss his medical records preceding September 2000 briefly, to the extent they impact the determination of whether he was disabled as of September 2, 2000, his alleged disability onset date in this case.

Horst G. Blume, M.D. treated Thomas for his work-related injury. In May 1996, Dr. Blume noted Thomas suffered from cervicogenic headaches originating in his upper cervical spine. The doctor stated Thomas had suffered several prior accidents (motor vehicle accidents and others), and the December 1994 accident had aggravated his pre-existing condition. He treated Thomas with epidural floods, nerve blocks, physical therapy, and medication.

Thomas continued to complain of neck and back pain, headaches, and arthritis in his knees. In November 1997, he complained to a physical therapist that he was unable to stand, walk, sit, or lie down without pain. However, he failed to appear for his scheduled physical therapy appointment. He continued to receive periodic epidural steroid injections. He was evaluated for sleep apnea, which was corrected with a CPAP, and remained non-severe as late as January 4, 2001.

Thomas was only moderately consistent and compliant with his doctors' orders. At times, he would fail to show up for a scheduled appointment or change his medication

dosage before obtaining a doctor's approval. Doctors and other medical practitioners continuously advised him to lose weight, exercise, and stop smoking. In April 1998, Thomas reported consuming large amounts of margarine, meat, and sweets. A nutritional consultant noted he did not appear to be motivated to exercise or change his diet, and he was not expected to adhere to instruction.

In May 1998, Mike McGrath, Ph.D. indicated Thomas may have been abusing alcohol or other drugs, and a physician who reviewed Thomas's psychological test results in June 1998, noted a high likelihood of alcohol or substance abuse. However, there is nothing further in the record to suggest ongoing abuse of alcohol or other substances.

Thomas began receiving regular treatment from Dr. McGrath in August 1998. Dr. McGrath found Thomas to be somewhat depressed, which he opined was related to Thomas's idle lifestyle. The doctor noted Thomas did some household chores and enjoyed fishing. He did occasional child care, and he collected and sold Hallmark ornaments and other types of collectibles. In September 1999, Dr. McGrath suggested Thomas get some vocational rehabilitation training. Thomas responded that he was "approximately 50 years old and that further training likely would not be reasonable." (R. 608) Dr. McGrath observed that Thomas looked considerably younger than 50, and the doctor continued to believe "[j]ob placement might be a possibility." (*Id.*) However, he noted vocational rehabilitation services would not work while Thomas had an application for Social Security benefits pending. He suggested Thomas could "pursue some employment hopefully" if his application was denied. (*Id.*)

Thomas had a repeat MRI of his back on October 13, 1999. Besides showing slight compression due to fat accumulation, the MRI was negative. On October 25, 1999, Dr. McGrath discussed Thomas's condition with a neurologist, who indicated he was unwilling to consider possible surgery until Thomas lost fifty pounds. (He weighed 312

at the time.) Dr. McGrath suggested to Thomas that if he lost one-third of a pound each day, he could lose the fifty pounds in six months. On November 22, 1999, Dr. McGrath noted Thomas was making little progress with his weight loss. He had not progressed further by December 9, 1999, and Dr. McGrath noted Thomas was not amenable to direct suggestions regarding weight loss.

On February 3, 2000, Thomas was fitted with a single-point cane. He had lost thirty pounds since the beginning of December, but then gained some weight back during the holidays. At that time, he weighed 310 pounds, and Dr. McGrath noted his upper maximum should be about 202 pounds. He encouraged Thomas to continue trying to lose weight, which the doctor felt might alleviate many of his physical problems.

On May 25, 2000, X-rays indicated Thomas had osteoarthritis of both knee joints, somewhat worse on the left. When he saw a doctor for follow-up on June 8, 2000, Thomas complained of low back aches and knee pain, and the doctor noted he had "new knee braces today." (R. 590) He was taking Zoloft for depression. Motrin, Naprosyn, and Feldene all had been ineffective for his chronic pain, and the doctor suggested he try Lodine. The doctor again discussed weight loss with Thomas, who stated he was unable to control his diet yet, but he was trying to eat vegetables. He indicated he had gone swimming once and it felt good, and he was walking some.

On August 15, 2000, Thomas underwent a disability physical examination by Thomas E. Schryver, M.D. Dr. Schryver noted Thomas had not worked since 1994. Thomas gave a history of right shoulder pain and arthritis since dislocating his shoulder in 1968, and he had current complaints of chronic low back pain with vague sciatic-type symptoms in his left leg. Dr. Schryver's clinical impressions of Thomas were: (1) obesity; (2) tobacco abuse (1/2 pack per day); (3) hypertension; (4) "Prior traumatic injury to his neck with evidence of degenerative disease in his low cervical spine. Also evidence of

degenerative disease in his left knee."; and (5) "Chronic dizziness, headaches, attributed to traumatic injury to his neck." (R. 639)

The doctor noted Thomas's testing was "somewhat compromised" because he would only ambulate with a cane. He evidenced good range of motion of his low back, and "surprisingly" good range of motion of his neck. Although he complained of pain on palpation of his right shoulder and the right side of his neck, the pain was not severe, which Thomas attributed to his lack of physical activity on the day of the exam. He had no remarkable physical findings.

Dr. Schryver reached the following conclusions regarding Thomas's physical limitations:

> The patient's physical limitations, based on his chronic pain complaints and his outlook on his condition, would say that limiting him to 25 pounds at the max is conceivable. He is using bilateral knee braces to help ambulate which significantly limits his ability to climb, kneel, and crawl. He said last time he was on his knees he fell and had to use a cane to ambulate. His ability to stand and sit is limited in total hours. He has to be able to get up and move around. Apparently standing for more than 1/2 hour produces intolerable pain. Sitting, I would think, would be manageable since he was comfortable sitting in my office. Seeing, hearing, speaking are unlimited. Traveling, again, he would have to get out and be able to move his legs and move around such as that. I don't find any hard neurologic findings. He does have evidence of degenerative joint disease in his right shoulder and his left knee. He does have the elevated blood pressure. He also has an outlook that is significant to debilitation on his part, which is hard to overcome in terms of doing the major physical labor he had done prior to his injury.

(*Id.*)

Dennis A. Weis, M.D. completed a residual physical functional capacity assessment of Thomas on September 27, 2000. (R. 643-50) He found Thomas could lift/carry up to twenty pounds occasionally and ten pounds frequently; stand/walk for at least two hours in an eight-hour workday, with normal breaks; sit about six hours in an eight-hour workday, with normal breaks; and push/pull without limitation. He concluded Thomas occasionally could climb ramps, stairs, ladders, ropes, and scaffolds; balance; stoop; kneel; and crouch. He opined Thomas should never crawl. The doctor found Thomas had no visual, manipulative, communicative, or environmental limitations.

In a summary of his findings (R. 651-52), Dr. Weis noted that although Thomas alleged disability due, in part, to carpal tunnel syndrome, there was no evidence of the condition in the record. Dr. Weis further noted, "[Thomas] came to this exam with a cane, but there is no evidence that he has ever been prescribed a cane or actually requires a cane for ambulation." (R. 651) The court finds this statement to be incorrect. As noted previously, the record indicates that on February 3, 2000, Thomas was measured and fitted with a single-point cane, and was shown how to walk with the cane. (R. 597) At his disability examination on August 15, 2000, Dr. Schryver noted Thomas would only walk using a cane.

Dr. Weis reached the following conclusions from his examination of Thomas:

> Consistency and Credibility: There are some inconsistencies which erode the claimant's credibility. His statement that he is capable of essentially nothing is not particularly well supported by the evidence contained in the file. He has been seen intermittently since 1995 for his complaints but rather infrequently. Radiologic studies are largely unremarkable save mild degenerative changes in the cervical and lumbar spine as well as his knees, yet the claimant maintains normal range of motion, has intact motor and neurological exams, and no evidence of radiculopathy or motor or neurologic defect. There

> is no evidence of any significant interference in daytime activity related to his sleep apnea nor is there evidence of carpal tunnel syndrome. These inconsistencies erode his credibility to an extent. Current examining physician finds him capable of lifting and carrying 25 pounds, postural activities, standing and walking limitations generally consistent with RFC as developed above. All evidence considered, the claimant should be capable of RFC as outlined.

(R. 652)

On November 20, 2000, Dr. Huckins, a staff physician at the V.A. Medical Center, wrote a handwritten statement in support of Thomas's attempt to obtain a handicapped parking permit. In the statement, Dr. Huckins indicates that in his opinion, Thomas's "medical condition is going to be a permanent problem/situation." (R. 588)

Another medical doctor performed a residual physical functional capacity assessment of Thomas on December 13, 2000. (R. 652-60, 664) The doctor noted that although Thomas used a cane, he was able to heel-toe walk. He evidenced slight limitation of range of motion in his shoulder, but otherwise the range of motion of his neck and back were good. Thomas had mild crepitus in his knees. X-rays and CT scans the doctor reviewed showed "only minimal abnormalities (degenerative changes) in the cervical spine, lumbar spine, right shoulder and knees." (R. 664) No neurologic deficits were noted.

The doctor found Thomas's musculoskeletal impairments could be considered severe. Considering those impairments, the doctor found Thomas could lift/carry up to twenty pounds occasionally and ten pounds frequently; stand/walk about six hours in an eight-hour workday, with normal breaks; sit about six hours in an eight-hour workday, with normal breaks; push/pull without limitation; occasionally climb ramps or stairs, stoop, kneel, crouch, and crawl; and balance frequently. The doctor opined Thomas could not climb ladders, ropes, or scaffolds. The doctor noted there were few objective findings

in the record to support Thomas's complaints of disabling pain. Although the doctor agreed with most of Dr. Schryver's findings regarding Thomas's limitations, the doctor found some of Dr. Schryver's conclusion were not supported by physical findings, including Dr. Schryver's statement that standing became intolerable for Thomas after one-half hour. (R. 659)

An internal medicine consultant reviewed the record on December 15, 2000, and found no evidence that Thomas had severe cardiovascular problems. The doctor noted Thomas's obesity "would warrant some postural limits," although his condition fell short of "the old 9.09 listing." (R. 663)

Dr. Huckins wrote a brief statement on January 1, 2001, in which he indicated Thomas was a current patient at the Sioux Falls V.A. Medical Center. The doctor opined that due to Thomas's physical problems, "employment involving physical effort would not be functionally possible at this time." (R. 587) Dr. Huckins was "unable to comment on other types of employment involving mostly nonphysical exertion," and noted he is neither a disability examiner nor an occupational specialist. (*Id.*)

Numerous additional medical records appear in the record; however, they are only relevant to the present appeal insofar as they might tend to corroborate, or contradict, Thomas's claim that he was disabled during the period from September 2 to December 31, 2000. The court finds the following evidence notable.

Thomas underwent X-ray studies of his right shoulder and heels on May 9, 2001. (R. 676-77) The shoulder X-ray indicated "moderate widening and mild irregularity of the AC joint consistent with remote trauma," but otherwise the study was negative. The X-rays of Thomas's heels showed "[m]oderate sized bilateral dorsal and plantar calcaneal spurs . . . slightly larger on the right," but otherwise the study was negative and there were no acute findings. Further X-ray studies of Thomas's shoulder and lumbosacral spine

in November 2001 also failed to reveal any acute findings. The only finding of any significance at all was a slight narrowing of the L4-5 disc space. (R. 675-76) These findings remained unchanged as late as June 25, 2002. (R. 698)

An ultrasound performed on August 6, 2001, indicated "normal appropriate flow" of both of Thomas's carotid arteries. (R. 676)

On August 2, 2001, Dr. Vikrant Choudhry of the V.A. wrote a brief opinion letter in which he stated Thomas had been under his care for severe bilateral arthritis of his knees. He noted Thomas was also being treated at the facility "for hypercholesteremia, hypertriglyceridemia, obesity, hypertension, and fibromyalgia and peripheral neuropathy of unknown etiology." (R. 586) Dr. Choudhry indicated that, in his opinion, Thomas was "permanently disabled." (*Id.*) Dr. Choudhry cited no specific findings in support of this opinion.

On December 5, 2001, Thomas underwent nerve conduction studies on both arms and his left leg, and an EMG of his right arm. The studies indicated "no abnormality with the exception of a mild right carpal tunnel." He also was evaluated by a rehabilitation specialist, who recommended longer-acting nonsteroidal anti-inflammatory drugs such as Feldene, possibly Gabapentin, and a bone scan. The doctor found Thomas had carpal tunnel syndrome of his right hand, with a positive Phalen's test. (R. 671-72)

Dr. Huckins examined Thomas following the nerve conduction studies, and Thomas complained of aches and pains, mainly in his hips, elbows, and knees; occasional numbness in both arms; and his right hip locking up occasionally. He reported smoking a pack of cigarettes a day, and indicated he was "not interested in quitting at this time." Thomas reported that although his chronic pain persisted, he felt good enough on his current medications, and he declined a trial of Vioxx or other medication changes. His other various conditions (obesity, possible cervical radiculopathy, and "[m]ultiple other

diagnoses") all were clinically stable, and Dr. Huckins indicated no additional testing or referral was necessary unless something changed. (R. 668-69, 695-96)

On January 16, 2002, the psychologist, Dr. McGrath, indicated Thomas's "psychosocial status is fairly stable at this point," and he had "not made any particular gains in terms of weight change." He noted Thomas remained unemployed, continued his hobby of collecting various items, and was living off of borrowed money. The doctor recommended continued, but fairly infrequent, visits. (R. 666, 693) Thomas next saw Dr. McGrath on April 9, 2002, a couple of weeks after his ALJ hearing in this case. Thomas told the doctor he believed his wife had sabotaged some of his records at the Social Security Administration. He indicated his wife worked there and had friends there. He also thought his wife had called the V.A. and changed Thomas's address without his knowledge because he was not receiving mail from the V.A. Despite these unusual thoughts, Thomas continued to function well emotionally. He was supporting himself by bargaining with thrift shops and selling items, and he reported selling his Hallmark collection.

3. Medical expert's testimony

Dr. Steven J. Wees performed a paper review of Thomas's medical records. He never saw or examined Thomas. Dr. Wees testified the record contains "some evidence of degenerative arthritis in [Thomas's] neck and lower back, as well as his knees, and he may also have some chronic soft tissue pain in [his] neck and upper back." He noted Thomas has had pain complaints dating back as far as 1994. He opined the severity of Thomas's arthritis "is on the mild side," and in his opinion, Thomas would be able to do work at the sedentary, light, or even moderate level. He stated Thomas could probably

lift up to twenty pounds occasionally, and ten pounds frequently, over the course of an eight-hour workday.

Dr. Wees opined Thomas could stand and walk for the majority of a day, up to six hours out of eight, with either a fifteen-minute break every two hours, or a half hour break every four hours. With similar breaks, he opined Thomas also could sit for most of the day. From his review of the medical records, Dr. Wees found no limitation in Thomas's ability to push or pull. Due to Thomas's weight, the doctor thought he might have problems climbing ladders and scaffolds, but he found Thomas should be able to climb stairs occasionally, up to one-third of the day. The doctor found no indication in the record that Thomas has a problem with balance.

Dr. Wees noted Thomas's "mild degenerative arthritis in his lower back and knees," together with his obesity, could cause him occasional problems with kneeling, but he could kneel, crouch, crawl, and stoop for up to one-third of a day. He found Thomas had no limitations with regard to reaching in all directions, gross manipulation, or fine manipulation, and he found no visual, communicative, or environmental limitations. Although Thomas's left thumb had been fused at one point, the doctor noted the procedure usually improves hand function, rather than limiting it.

Dr. Wees acknowledged that Thomas was wearing bilateral knee braces and using a cane for ambulation. However, he was unable to justify the need for the braces and cane from the medical records. He found some of the symptoms Thomas described to be out of proportion to the medical findings, and noted the medical findings indicated Thomas's arthritis in his knees was mild.

After hearing Thomas's testimony, Dr. Wees opined it was not necessary for the ALJ to send Thomas for further evaluations or testing. He gave the following conclusion regarding his review of the record:

> When I reviewed these records, my initial medical opinion was Mr. Thomas['s] symptoms were disproportionate to the findings. The findings seem to be relatively mild and yet he has a number of complaints that don't seem justified or in, in accordance with [what] one would expect based on the medical facts. Toward the end of these lengthy records, there were several psychological profile test[s] done that indicated [somatoform] disorder, and . . . a tendency to excessive focusing on these types of complaints, and usually when one sees that disproportion between the medical findings and the level of complaints, one gets that type of psychological profile. Now I don't think additional testing is going to tell us much more[.]

(R. 72) Dr. Wees noted Thomas's complaints "are very real to him," but he did not believe the medical evidence justified the level of limitation that Thomas perceives himself to have. He opined Thomas has some psychological factors that over-amplify his perception of his limitations. He stated there are "various types of work this gentleman could do and be gainfully employed on a continued basis, and there may be some need to deal with some of these psychological issues to keep some of his symptoms under control." (R. 73)

Dr. Wees specifically disagreed with Dr. Choudhry's statement that Thomas could not work. He also disagreed with the decision to prescribe a cane for Thomas, stating, "I don't see sufficient evidence that justifies it." (R. 75) Regarding the knee braces, Dr. Wees stated if Thomas feels they help, the doctor had no problem with him using them, but whether he used them or not would not change the doctor's opinion about Thomas's limitations. He also noted that just because Thomas wears knee braces does not mean he needs them for stability when he walks. The doctor observed people often do things that, in their own minds, helps their symptoms, such as wearing copper bracelets.

4. Vocational expert's testimony

The ALJ asked VE Gail Leonhardt the following hypothetical question, considering a 48-year-old claimant with a twelfth grade education who had Thomas's past relevant work experience:

> [T]his is an individual who's been diagnosed with degenerative arthritis, who's been diagnosed with sleep apnea, which is controlled, and I find that is non-severe. He has alleged carpal tunnel but there's no evidence of that in the record, and I find that this individual can lift 20 pounds occasionally, 10 pounds frequently, sit/stand and walk, six out of eight. Never climb ladder, ropes, scaffolds. Occasionally climb stairs. Frequently balance, occasionally kneel, occasionally crouch, occasionally crawl, occasionally stoop, that he is unlimited in his manipulative functions. He has no visual or communicative disabilities, and he has no environmental limitations.

(R. 78-79) In addition, the ALJ asked the VE to take into consideration the results of psychological testing performed by "John McNegen (Phonetic), licensed psychologist, certified health care provider, Brown Psychological Assessment Consultation Therapy," whom the VE indicated was "a certified school psychologist." (R. 79) The exhibit (which was not included in the record before the court) reportedly contained graphs and test results from "a number of questions regarding anxiety, regarding [Thomas's] opinions . . . regarding his ability to do work." (*Id.*) The ALJ limited consideration of these records to the clinical findings because the ALJ found Thomas exaggerates. (*Id.*)

The VE summarized the findings, noting the doctor marked "very good" on all of the items on a checklist regarding Thomas's ability to perform work, including his ability to follow work rules, relate to coworkers, deal with the public, use judgment, interact with supervisors, deal with work stresses, function independently, maintain attention and

concentration; and understand, remember, and carry out detailed, complex, and simple job instructions. (R. 80)

Based on the ALJ's hypothetical, and considering that the VE found nothing in the psychological testing to inhibit Thomas from going to work, the VE opined Thomas could return to his past work as a poultry eviscerator, which the VE stated was performed at the light level. (*Id.*) The VE indicated Thomas could perform the job both as he performed it, and as it is performed in the national economy. The VE noted the job fits within the restrictions of lifting ten pounds frequently and twenty pounds occasionally. The VE acknowledged the job is considered a full-time standing job, but according to the VE, a full-time standing job only requires an employee to stand for six hours of an eight-hour day. Upon further consideration, the VE acknowledged the job actually would require an employee to stand seven hours out of eight (*e.g.*, work two hours, take a fifteen-minute break, work another hour and forty-five minutes, take a half hour lunch break, work an hour-and-a-half, take a fifteen minute break, and then work another hour and forty-five minutes).

Dr. Wees then was recalled, and he testified Thomas would be able to stand for seven hours in an eight-hour day. He indicated that was reasonable, and "still within the medical facts as they were presented[.]" (R. 88) In response to questioning by Thomas's attorney, Dr. Wees stated if Thomas could stand for six hours, he likely could stand for seven, and if he could stand for seven hours, he likely could stand for eight.

The VE agreed that if Thomas's testimony were found to be credible regarding his inability to sit for more than a short period of time before needing to change positions, then he would be unable to return to any of his past work.

In follow-up, Thomas testified that in the poultry eviscerator job, he worked on an assembly line, requiring him to stand all the time. He sometimes also lifted fifty-pound

boxes. He worked at least eight hours, and sometimes worked ten-hour shifts. He got a ten-minute break in the morning and a ten-minute break after lunch, and he got a half hour for lunch for which he was not paid. He stated there was nowhere to sit down in the packing house.

The VE reiterated her opinion that Thomas could perform the job both as he performed it and as it is performed in the national economy, based on DOT guidelines for the job and Dr. Wees's testimony about Thomas's abilities. Despite lengthy questioning by both the ALJ and Thomas's attorney, the VE continued to maintain that a normal eight-hour workday in a packing house would only require an employee to stand for a total of six or seven hours.

5. The ALJ's conclusion

The ALJ found Thomas "has the following medically determinable impairments which have imposed more than slight limitations upon his ability to function: degenerative arthritis, hypertension, right carpal tunnel syndrome, obesity, and dysphoria." (R. 29) She found Thomas's sleep apnea was not a severe impairment. The ALJ found Thomas's other impairments, although severe, did not meet the requirements of the Listings.

The ALJ found Thomas's testimony regarding his limitations was not credible. She held Thomas "is able to perform his past relevant work as a poultry eviscerator, which was described by the vocational expert as unskilled, and light in exertional demand." (*Id.*)

The ALJ found Thomas had not performed substantial gainful activity since September 2, 2000. The ALJ noted Thomas did not claim his impairments met the Listing requirements, and she found "the record contains no evidence which would support such a finding." (R. 23)

The ALJ found the record indicates Thomas's medically-determinable impairments reasonably could be expected to produce the type of musculoskeletal discomfort he described in his testimony. However, the ALJ found the objective medical evidence of record did not substantiate Thomas's allegations with respect to the severity of his symptoms and his resulting limitations. (R. 27) The ALJ based her determination that Thomas's subjective complaints lacked credibility on the following:

> [A] cervical x-ray showed only mild degenerative changes and a cervical MRI scan revealed no abnormalities; x-rays of both knees revealed minimal findings on the right and somewhat more prominent findings on the left; and electrodiagnostic testing showed only mild carpal tunnel syndrome on the right with no evidence of left carpal tunnel syndrome and it does not appear that the Claimant is under any ongoing treatment for carpal tunnel syndrome. Further, Dr. Schryver reported on August 15, 2000 that the Claimant's lumbar MRI scan did not reveal any major problems; the Claimant did not report any problems with grip strength (his grip strength was noted to be normal at 5/5); he had good range of motion of his back, neck and right shoulder; range of motion of his hips was unremarkable; and he had fairly well preserved range of motion of his knees. Dr. Schryver opined that the Claimant is able to lift 25 pounds, and he observed that the Claimant was comfortable sitting in his office. In addition, on December 5, 2001, Dr. Huckins reported that the Claimant's extremities were unremarkable on physical examination. He reported an assessment of multiple myalgias and arthralgias and noted that the Claimant "declines a trial of Vioxx or change to other medication" and "states he feels good enough with his current regimen". Dr. Huckins opined that the Claimant was clinically stable. Moreover, it is noted that Dr. Wees opined at the hearing that the Claimant's arthritis is of mild severity, and that the Claimant is able to perform sedentary, light or moderate type work activity. Dr. Wees opined that the Claimant's symptoms have been disproportionate to the

> objective findings, which seemed to be relatively mild, and he stated that the Claimant's complaints did not seem to be justified based on the medical facts. Dr. Wees stated that he did not see any justification for the use of a cane, and that he disagreed with the Veterans Administration physician who said the Claimant is unable to work.
>
> Although the Claimant has reported that he is unable to walk without a cane, and that he has been using braces for his knees, it is noted that neither Dr. Hof nor Dr. Huckins mentioned the Claimant using braces or a cane when he was evaluated by them in December 2001.

(R. 27, citations omitted)

The ALJ further noted Thomas's hypertension is adequately controlled, and "he has been noncompliant with regard to his physicians' recommendations to lose weight, even though he has been advised that his obesity impacts on his musculoskeletal complaints." (R. 27-28) The ALJ noted Thomas's sleep apnea is adequately controlled. Regarding his mental functioning, the ALJ noted Thomas denied feeling depressed, and his condition was "fairly stable." (R. 28) The ALJ found Thomas's mental functioning resulted in "mild restriction of activities of daily living; mild difficulties in maintaining social functioning; no difficulties in maintaining concentration, persistence or pace; and . . . no repeated episodes of decompensation of extended duration." (*Id.*)

The ALJ gave great weight to the opinion of Dr. Wees, and little or no weight to Dr. Choudhry's brief opinion that he believed Thomas to be "permanently disabled," noting Dr. Choudhry failed to provide any rationale or objective findings to support his conclusion. The ALJ found the objective medical evidence of record did not substantiate Dr. Choudhry's conclusion, and further found Thomas "has exaggerated his problems and [Dr. Choudhry] has taken such complaints at face value." (*Id.*)

The ALJ determined Thomas retains the residual functional capacity to lift twenty pounds occasionally and ten pounds frequently; sit, and stand or walk, for six hours in an eight-hour day, with normal breaks; occasionally climb stairs, kneel, crouch, crawl, and stoop; and frequently balance. She found he cannot climb ladders, ropes, or scaffolds, and he has no visual, communicative, or environmental limitations. (*Id.*)

Considering evidence in the record, Thomas's testimony, "and the testimony of a highly qualified vocational expert under contract with the Office of Hearings and Appeals," the ALJ found Thomas's "past relevant work as a poultry eviscerator (described by the vocational expert as unskilled, and light in exertional demand) did not require abilities beyond those set forth in the residual functional capacity assessment discussed above." (R. 28-29) The ALJ therefore found Thomas was able to return to his past relevant work, and he was not disabled. (R. 29)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant's work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see "whether the claimant has a severe impairment that significantly limits the claimant's physical or mental ability to perform basic work activities." *Dixon*, 353 F.3d at 605; *accord Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

> The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." . . . Such abilities and aptitudes include "[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling"; "[c]apacities for seeing, hearing, and speaking"; "[u]nderstanding, carrying out and remembering simple instructions"; "[u]se of judgment"; "[r]esponding appropriately to supervision, co-workers, and usual work situations"; and "[d]ealing with changes in a routine work setting."

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is

considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); *see Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon*, *supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. *See id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined at step four], age, education, and work experience." Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant's RFC will allow the

claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra,* 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra,* 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier,* 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796*; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must "search the record for evidence contradicting the [Commissioner's] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial." *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline*, *supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not "reweigh the evidence presented to the ALJ," *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or "review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *accord Baldwin*, 349 F.3d at 555. This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822

(8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner's decision "merely because substantial evidence would have supported an opposite decision." *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997); *see Pearsall,* 274 F.3d at 1217; *Gowell*; 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;

5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

The court finds the record does not contain substantial evidence to support the Commissioner's decision denying Thomas benefits. However, neither does the record contain substantial evidence to support an award of benefits, and the court finds further proceedings are required in this case.

The VE's opinion is virtually worthless, for two reasons. First, the VE failed to base her opinion on the limitations contained within the ALJ's hypothetical question. The ALJ then compounded the problem by failing to insist that the VE do so. Although the court recognizes that the ALJ attempted to clarify the VE's opinion, when the VE continued to respond ambiguously the ALJ then relied upon the VE's ambiguous opinion without further clarification.

Second, the ALJ's determination of Thomas's RFC was based almost entirely on the opinion of Dr. Wees, a non-treating expert who never examined or even saw Thomas, and whose testimony was only slightly more helpful than the VE's. The court finds Dr. Wees changed his testimony when he was recalled to testify, without providing adequate justification for doing so. Even if the record supported the conclusion that Thomas could stand for six hours out of eight (which, as discussed below, the court finds it does not), it was incomprehensible for Dr. Wees to state that if Thomas could stand for six hours, he could stand for seven, and if he could stand for seven hours, he could stand for eight. The proposition itself is ludicrous, and provides a woefully insufficient basis for a determination of Thomas's RFC.

Further, the ALJ failed to provide adequate justification for totally rejecting the opinions of Thomas's treating physician, and of the consulting physician who actually examined Thomas. In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

> The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that a treating physician's opinion regarding an applicant's impairment will be granted "controlling weight," provided the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2). Consistent with the regulations, we have stated that a treating physician's opinion is "normally entitled to great weight," *Rankin v. Apfel*, 195 F.3d 427, 430 (8th Cir. 1999), but we have also cautioned that such an opinion "do[es] not automatically control, since the record must be evaluated as a whole." *Bentley v. Shalala*, 52 F.3d 784, 785-86 (8th Cir. 1995). Accordingly, we have upheld an ALJ's decision to discount or even disregard the opinion of a treating physician where other medical assessments "are supported by better or more thorough medical evidence," *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997), or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions, *see Cruze v. Chater*, 85 F.3d 1320, 1324-25 (8th Cir. 1996).
>
> Whether the ALJ grants a treating physician's opinion substantial or little weight, the regulations provide that the ALJ must "always give good reasons" for the particular weight given to a treating physician's evaluation. 20 C.F.R. § 404.1527(d)(2); *see also* SSR 96-2p.

Prosch, 201 F.3d at 1012-13

Here, the ALJ failed to "give good reasons" for discounting the opinions of Drs. Choudhry and Schryver. The only reason given was that the doctors' opinions were not

supported by the evidence of record. Under these facts, the court finds that statement to be inadequate, specifically because the ALJ failed to develop the record fully and fairly. "It is the ALJ's duty to develop the record fully and fairly, even in cases in which the claimant is represented by counsel. *Dozier v. Heckler*, 754 F.2d 274, 276 (8th Cir. 1985)." *Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990); *accord Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994); *Cox v. Apfel*, 160 F.3d 1203, 1209 (8th Cir. 1998); *Johnson v. Callahan*, 968 F. Supp. 449, 458 (N.D. Iowa 1997); *Barry v. Shalala*, 885 F. Supp. 1224, 1241-42 (N.D. Iowa 1995).

In the present case, both the ALJ and Dr. Wees questioned the basis for Dr. Choudhry's statement that Thomas was unable to perform any type of work, yet the ALJ did nothing to follow up with the doctor to determine the basis for his statement. The court finds Thomas was prejudiced by the ALJ's failure to develop the record fully, requiring remand for further proceedings. *See Onstad v. Shalala*, 999 F.2d 1232, 1234 (8th Cir. 1993) (relevant inquiry is whether the claimant "was prejudiced or treated unfairly by how the ALJ did or did not develop the record; absent unfairness or prejudice, we will not remand.") (citing *Phelan v. Bowen*, 846 F.2d 478, 481 (8th Cir. 1988)). The court finds the medical evidence in the record does not provide a sufficient basis for the ALJ's conclusion that Thomas was not disabled as of September 2, 2000.

In addition, the court specifically finds Thomas is unable to return to his past relevant work. The record does not support the ALJ's determination that Thomas retains the residual functional capacity to stand or walk for six hours in an eight-hour workday. The record indicates Thomas can stand and walk for up to half an hour at a time, and then he must sit down and rest. He testified he walks around the Goodwill store and the grocery store for twenty minutes or so without excessive pain, and the court finds his testimony in that regard to be credible. The court does not address the remainder of the

RFC determination, leaving that task for the Commissioner upon remand, after further evidence is obtained to support a decision.

Upon remand, the Commissioner is directed to obtain further evidence to determine the basis for the opinions of Thomas's treating and examining physicians that he is wholly unable to work, to reevaluate Thomas's RFC in light of such evidence, and to determine whether there is other work existing in significant numbers in the national economy that Thomas could perform given his RFC, age, education, and work experience.

V. CONCLUSION

For the reasons discussed above, the Commissioner's decision is **reversed**, and this case is **remanded** to the Commissioner for further proceedings consistent with this opinion.[2]

IT IS SO ORDERED.

DATED this 19th day of March, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[2]NOTE: The plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.